No. 22,515

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 899, AFL-CIO; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL UNION NO. 556, AFL-CIO; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 381, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOINT COUNCIL OF TEAMSTERS NO. 42; and SAN LUIS OBISPO BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,
Respondents.

INTERVENOR'S BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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INTERVENOR'S BRIEF

JURISDICTIONAL STATEMENT

This is a petition by the National Labor Relations Board (hereinafter called the Board) to enforce its Decision and Order (*State-Mart, Inc., d/b/a Giant Food,* 166 NLRB No. 92). This Court has jurisdiction by virtue of Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C.,

Secs. 151 et seq., as amended by 73 Stat. 519), hereinafter called the Act.

Intervenor, State-Mart, Inc., was the successful charging party in the proceedings before the Board.

Respondents have filed counter-petitions asking that enforcement be denied.

STATEMENT OF THE CASE

Intervenor operates two retail markets. One is in Arroyo Grande, California. The other is in San Luis Obispo, California. The two stores are approximately 13 miles apart. Both stores sell a general line of groceries, meats and produce.

The Arroyo Grande store opened in September, 1961. The San Luis Obispo store opened on November 2, 1965.

The Arroyo Grande store has been picketed since it opened. However, until the San Luis Obispo store opened the pickets at Arroyo Grande were few in number and there was no interference with deliveries.

Pickets also appeared at the San Luis Obispo store when it opened. There were as many as 70 at one time. (Tr. 90).[1] Coincidentally there was a substantial increase in the number of pickets at the Arroyo Grande store. (Tr. 135).

After the San Luis Obispo store opened the pickets at both stores interfered with the ingress and egress of patrons. (Tr. 90, 91, 97, 102, 123, 124, 135). Pickets

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[1]Numbers in parentheses refer to the Reporter's Transcript.

shouted obscenities at patrons and employees, photographed automobiles entering the premises and recorded license numbers. (Tr. 100-101, 123-124, 126-127, 130). The San Luis Obispo store was picketed 24 hours per day. The store was open 12 hours per day. (Tr. 91). Pickets appeared at the Arroyo Grande store at 6:00 a.m. The store opened at 9:00 a.m. (Tr. 125).

On January 19, 1966, Intervenor obtained an injunction in a state court limiting the number of pickets at the San Luis Obispo store. By agreement the restrictions imposed by the state court were observed also at the Arroyo Grande store.

Until this point the picketing had been carried on by Respondent Retail Clerks and Respondent Meat Cutters. They had been joined in December, 1965, by Respondent Building Trades Council.

Despite the mass picketing and accompanying conduct there was not at this point any substantial interference with deliveries of merchandise.

On January 20, 1966, Respondent Teamsters and Respondent Teamsters Joint Council joined the picketing at both stores. After that date all or almost all deliveries of merchandise stopped. (Tr. 94, 125).

There is evidence that deliveries were stopped by pickets jumping in front of the trucks and jumping on their running boards. (Tr. 94). There is also evidence that pickets followed the manager of the San Luis Obispo store during trips by him from the store to pick up merchandise for the store elsewhere. On

at least two occasions pickets followed the manager onto premises of neutral employers. (Tr. 145-147).

On or about January 27, 1966, Ted Frame, Intervenor's counsel, telephoned Kenneth Schwartz, counsel for Respondent Retail Clerks, to see what could be done to remove the pickets. Schwartz told Frame that Respondents would remove the pickets if Intervenor met the "area standards". (Tr. 13, 150). Schwartz did not want to discuss on the telephone what the "area standards" were. A meeting was arranged to discuss the matter further. It took place at San Luis Obispo on February 1, 1966.

The meeting at San Luis Obispo was attended by representatives of Intervenor and of Respondents. Frame acted as spokesman for Intervenor. Schwartz acted as the principal spokesman for Respondents.

Respondents defined "area standards" as the identical employment terms and benefits provided for in collective bargaining agreements with other market owners within Respondents' jurisdiction. (Tr. 153, 236-237).

Intervenor was told that the cost of its meeting such "standards" was immaterial. (Tr. 153).

As the "standards" changed from time to time (due to negotiated changes in collective bargaining agreements with other market owners), Intervenor was to change its employment terms and benefits accordingly. (Tr. 65, 177).

During the meeting Respondents handed Intervenor copies of Respondent Clerks' and Respondent

Meat Cutters' area-wide industry agreements. (G. C. Exhs. 2 and 3). Respondents did so to show Intervenor what the "standards" were. (Tr. 173). Respondents also handed Intervenor a pamphlet entitled "Industry Vacation Plan" (G. C. Exh. 4).

Before handing Intervenor the industry agreements, Respondents struck out the union recognition and union shop clauses. However, clauses relating to discharge procedures, seniority, times of store meetings so as not to conflict with union meetings, visits of union representatives to the stores, discharge of expelled union members, grievances and arbitration, health and welfare benefits and trust funds, and pension provisions and trust funds, were not stricken.[2]

The industry agreements provide *inter alia* for "portability" of pension benefits.[3]

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[2]A more complete tabulation appears in footnote "3", page 6, of Trial Examiner Penfield's decision dated January 12, 1967.

[3]The Retail Clerks' industry agreement (G. C. Exh. No. 2) refers on page 23 to the Southern California Retail Clerks Unions and Food Employers joint Pension Trust Fund (G. C. Exh. No. 6). All retail clerks working in Southern California for any employer who has a collective bargaining agreement with Local 137, 324, 770, 899, 905, 1167, 1222, 1428 or 1442 are covered. (See G. C. Exh. No. 6, P. 1, Article I, Declaration of Trust, and p. 1, Article I, Joint Pension Plan). If a member goes to work for an employer who is not a signatory to a collective bargaining agreement, his Continuous Service is broken after 12 months and he loses his previous credits to his pension benefit unless he had a vested pension (10 years Credit Service). (G. C. Exh. No. 6, p. 4, Article VI, Joint Pension Plan).

Portability is provided for in Article I, Sections 1, 2, and 3, of the Declaration of Trust which begins on page 30 of the Meat Cutters industry agreement (G. C. Exh. No. 3) and in the September 29, 1958, amendment which appears on page 39 of the industry agreement.

"Portability" means that if an employee builds up credits while working for an employer, he does not lose those credits if he takes a job with another employer, *so long as* both employers are signatories to the industry agreement. (Tr. 233, line 15, to 234, line 8; 237, lines 11-12).

Intervenor was not willing to meet Respondent's demands. The picketing continued.

Following a timely charge filed by Intervenor, the Board's Regional Director issued a complaint which alleged that the picketing, without an election petition, was for a recognitional or organizational purpose in violation of section 8(b) (7) of the Act. The Trial Examiner concluded that it was, and the Board agreed.

STATUTE INVOLVED

Section 8(b)(7) of the Act provides, in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or to cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative . . .

* * *

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of picketing: Provided . . .: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

QUESTION PRESENTED

The sole question presented here is: Was any object of the picketing to force recognition or bargaining?

SUMMARY OF ARGUMENT

The Board's decision has three bases:

1. A recognitional object is implicit when a union seeks to require an employer to put into effect and maintain the identical employment terms and benefits defined in the union's area-wide collective bargaining agreement; and that is what happened here.

2. Respondents sought to compel intervenor to adopt their contracts.

3. Intervenor's adoption of the contracts was its only practical alternative to Respondents' economically impossible demands.

Each basis finds support in the facts and the law. In addition there is a fourth basis. It is the totality of Respondents' conduct.

ARGUMENT

PRELIMINARY STATEMENT

Section 8(b) (7) was enacted in 1959 as part of the Landrum-Griffin amendments to the Act. Recognition or organization need not be the sole or principal object of the picketing. A violation occurs if *any* object of the picketing is to force recognition or bargaining. *National Packing Co. v. NLRB,* 377 F.2d 800 (10th Cir. 1967). That issue is a question of fact. *NLRB v. Suffolk County District of Carpenters,* ..... F.2d ....., 56 LC No. 12,351 (2nd Cir., December 13, 1967). The Board's finding on it is determinative if supported by substantial evidence. *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 488; *NLRB v. Butchers Union, Local No. 120* ..... F.2d ....., 57 LC No. 12,560 (9th Cir., February 21, 1968, No. 21,742).

IMPLICIT OBJECT

In this case an object to force recognition or bargaining was implicit in the very nature of Respondents' demands.

Three key facts are uncontroverted:

1. Respondents defined the "standards" they sought as the identical employment terms and benefits provided for in their collective bargaining agreements with other store owners. (Tr. 236-237).

2. Intervenor's costs were immaterial. (Tr. 153).

3. Intervenor was to change its "standards" as Respondents' collective bargaining agreements changed. (Tr. 65, 177).

After the enactment of Section 8(b) (7), "recognitional" or "organizational" picketing to compel recognition or bargaining was prohibited unless a timely election petition was filed. On the other hand, "advertising", "informational" or "publicity" picketing to advise the public that an employer does not employ members of, or have a contract with a union was expressly permitted if deliveries were not interfered with.

A third form of picketing evolved. It has been referred to as "area standards" picketing and may be defined as a protest against alleged "substandard" conditions. It has been permitted even though deliveries are interfered with. In effect, the area standards doctrine is an exception to the restrictions imposed by the Landrum-Griffin amendments to the Act.

The basic premise of the Board's decision in this case is that the area standards doctrine need go no further than to accord a union a means, apart from organization and recognition, of preventing the un-

organized employer from obtaining a competitive advantage over the organized employer, and that the lawful object effectively can be achieved by assuring that the unorganized employer is required to pay employee costs equivalent to those paid by the organized employer, but that when the union seeks to require and maintain the identical employment terms and benefits as defined in its collective bargaining agreements with other employers, it goes beyond the lawful object.

The premise is sound.

The first Section 8(b) (7) decision involving area standards picketing is *Houston Building & Construction Trades Council* (*Claude Everett Construction Co.*) 136 NLRB 321 (1962). The objective of the picketing involved "was to induce the Company to raise its wage rates to the union scale prevailing in the area". (136 NLRB 321, at 323).

The opinion refers to *International Hod Carriers, etc., Local 41* (*Calumet Contractors Association*), 133 NLRB 512 (1961), an earlier decision which arose under Section 8(b) (4). In that case, the union sought to require the Employer "to conform standards of employment to those prevailing in the area". (133 NLRB 512). However, there is no indication in the decision or in a prior decision in the case (130 NLRB 78) of what the "standards" were, how they were defined, or how they were to be applied.

Everett was followed by *Local 741, United Assn. of Journeymen, etc.* (*Keith Riggs Plumbing and Heating Contractor*), 137 NLRB 125 (1962).

In *Keith Riggs* the Union sought to compel Riggs to "raise his wage scale to the standards prevailing in union contracts". (137 NLRB 1125, 1139). The Union's defense was that "its sole object was to require Riggs to pay the Plumbers' wage scale prevailing under its contracts with employers in the area". (137 NLRB 1125, at 1134). The Union's business agent testified that the Union's "sole interest was that Riggs pay the prevailing wage scale for plumbers in the area". (137 NLRB 1125, at 1127).

In *International Hod Carriers etc. (Texarkana Construction Co.)*, 138 NLRB 10 (1962), area standards picketing was permitted where the purpose of the picketing was to induce the employer to raise its wages to the level of the prevailing rate for the area.

In *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, etc. (Foor Engineering Co.)*, 143 NLRB 54 (1963), the Union sought to require the Employer to "hire four pipefitters, since he expected to use four welders",[4] and to pay in addition to the Union scale of wages, 30 cents per hour to a welfare fund. The Trial Examiner, whose decision was adopted, found a violation of Section 8(b) (7). He concluded that the Union's objective was to require Foor to adhere to and operate under the terms of the Union's area contract with other employers. The union objective is the same in

[4]By analogy, both the Retail Clerks and the Meat Cutters Industry agreements in the present case restrict the number of apprentices in proportion to other employees. (G. C. Exh. No. 2, Article VI, Sec. M, p. 12, and July 1, 1964, Amendment; and G. C. Exh. No. 3, Article 22, Section A, p. 13).

this case. As noted in *Foor,* it is equivalent to forcing or requiring the Employer to recognize or bargain with the Union.

The thrust of the area standards decisions has been recognition of union concern about competitive advantage to be gained by nonunion employers over union employers, thereby jeopardizing the job security of union employees. The force of competition can be met if the unorganized employer is compelled to incur costs which equal those incurred by organized employers.

How the unorganized employer apportions the costs should be up to him. If the Union wants to tell him how, and it wants him to change whenever its contracts change, then quite obviously, its concern is more than competitive advantage.

In *Centralia Bldg. & Trades Council v. NLRB,* 363 F. 2d 699 (D.C. Cir. 1967), a Union sought a written agreement under which the Employer would have obligated itself to pay to its employees "a total amount either by way of wages or fringe benefits equivalent to the amount of the total economic package being received by employees working under the Union Agreement". As the Union Agreement was renegotiated from time to time, the Employer's total economic package was to change accordingly. The Union made "no substantial effort" to ascertain the employer's actual wage or employment standards before instituting its picketing. The Union disclaimed any recognitional objective. The Board concluded that a violation of Section 8(b) (7) was implicit in the

nature of the Union's demand. The Board's decision is enforced by the Court.

The Court recognized that with such an agreement in effect, little would be left for an employees' representative to negotiate.

In the present case no written agreement was sought by Respondents. The Trial Examiner found that no "agreement as such" was sought. Intervenor objected to this finding in the proceedings before the Board because contractual assent may be based on conduct as well as writings or words. *Restatement of Contracts* (A. L. I.), Section 21.

However, the rationale of *Centralia* does not depend on the presence or absence of an agreement. The rationale is that if what the Union seeks to require the Employer to do has the same "net effect" as entering into a collective bargaining agreement, it is proscribed. See, *Hotel & Restaurant Workers of Las Vegas* (*Holiday Inns*), 169 NLRB No. 102.

Whatever benefits State-Mart was to provide its employees were to be keyed to Respondents' industry agreements. (Tr. 153). The benefits were to be changed whenever the agreements changed. Respondents' principal spokesman explained that State-Mart would be expected to maintain standards in the area, whatever they might be, and for whatever time they would be in effect. (Tr. 177). The understanding of Edward Young, State-Mart's president, that "each time the union gets more benefits, you have to change with it" (Tr. 65), is not disputed.

This case presents a clearer violation of Section 8(b) (7) than did *Centralia.* In *Centralia,* the request was for equal costs. The vice was that the costs were to change as the union's collective bargaining agreement changed. Here, the demand goes beyond costs. The identical terms and benefits must be provided.

CONTRACT ADOPTION

As noted in the Statement of the Case, Respondents handed Intervenor copies of their collective bargaining agreements at the San Luis Obispo meeting. Respondents marked out clauses specifically relating to recognition and union security, but did not mark out a number of other clauses which smack of bargaining, among them discharge procedures and seniority provisions, apprentices, timing of store meetings not to conflict with union meetings, grievance and arbitration procedures, and provisions having to do with health and welfare and pension trust funds.

Respondents' position is that their spokesmen made no effort to strike all clauses deemed inapplicable. However, their chief spokesman, Schwartz, testified that the agreements were produced to show what the "standards" were, that he did not state that there were some benefits Respondents did not want, and that none were negotiable. (Tr. 173).

The Board adopted its Examiner's finding that Intervenor reasonably assumed that all of the provisions not specifically stricken were applicable if it were to

undertake to conform to area standards. In itself the finding is reasonable.

PRACTICAL IMPOSSIBILITY

In two ways, the nature of Respondents' demands posed economic and practical impossibilities for Intervenor. The alternative was to "go union", just as a horse turns to avoid the pressure of a bit.

First, Respondents' insistence on *identical* health, welfare and pension benefits put Intervenor in the position of having to provide 50 to 70 employees with the very same benefits provided by collective bargaining agreements for approximately 20,000 retail clerks and approximately 10,000 butchers. (Tr. 180, 233). It was within the Board's *expertise* to conclude, as it did, that the difference in comparative costs of equivalent benefits for the two groups presented Intervenor with a virtual economic impossibility.

Second, the only way Intervenor could have provided the benefit of portability of pension credits, as that benefit is defined in Respondents' collective bargaining agreements, was to have signed Respondents' agreements. Credits survive only if transferred from one signatory to the agreement to another signatory.

Respondents deny that they ever mentioned portability. (Tr. 162). Whether they did is immaterial. They did not exclude it. It is one of the benefits provided for in the agreements they produced.

Schwartz admits that he discussed pensions with Intervenor's spokesman. He then testified (Tr. 171, lines 10-16):

"Q. (By Mrs. Robbins) Yes. These are generalities, you know. A pension can be many things.

A. I think pension means a specific thing to somebody in this business, and health and welfare means something to somebody else in this business.

Mr. Frame is a practitioner in this business, and I am sure he knows."

Respondents argued during the Board proceedings that Intervenor could have compensated for portability by setting up a special bank account of some sort. How in Respondents' judgment that would have worked, both as to employees coming to work for Intervenor from union employment and as to employees going from Intervenor to union employment, never did appear.

The point, we suppose, is this: *Identical* benefits are what Respondents demanded. The *identical* benefit as to portability is transfer of credits.

TOTALITY OF CONDUCT

Another basis for the Board's decision is one it did not choose to rely on. It is the totality of Respondents' conduct.

Considering all of Respondents' conduct including what happened at the meeting in San Luis Obispo, the mass picketing, the obscenities, the obstruction of customers' ingress and egress, the joining together of several labor organizations, and the subsequent inter-

ruption of almost all deliveries certainly supports a conclusion that the picketing was aimed at something more than so-called "area standards".

The Trial Examiner observed that if standards picketing is to be permitted, then there is no reason to preclude vigorous standards picketing. However, in other cases the Board has not hesitated to consider all the circumstances. See, e.g., *Local 3, Int'l Brotherhood of Electrical Workers (Atlas Reid, Inc.),* 170 NLRB No. 73 (1968), and *Truck Drivers Local 649 (Cold Springs Construction Co.),* 162 NLRB No. 152 (1967).

The Second Circuit recently recognized that interruption of deliveries, as such, raises an inference of an impermissible purpose. *NLRB v. Suffolk District Council of Carpenters,* supra, ... F. 2d ....., 56 LC No. 12,351 (2nd Cir. December 13, 1967). As therein stated,

> "Such attempts demonstrate an intent to force both the employer and employees into a position more conducive to union recognition or organization demands. See Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 267-68 (1959). The employer may suffer serious loss if he either cannot receive deliveries or must expend substantial special time and effort, because of the picketing, in going outside his usual operations to obtain essential materials. Recognition may be his only recourse if he wishes to maintain profitable operations. Similarly, the employee's choice whether or not to belong to the union cannot be freely exercised; organization with the picketing union

may be necessary to ensure continuance of their jobs. This is the aspect of picketing which Congress specifically meant to control when it forbade 'forcing or requiring' recognition or organization by picketing for more than 'a reasonable period of time' without the filing of a petition for an election."

CONCLUSION

For the reasons herein stated, together with such arguments as may be advanced therefor by the General Counsel in his brief, enforcement of the Board's order should be granted.

Dated, Coalinga, California,
May 3, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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